IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-678

EXECUTIVE JET AVIATION, INC., ET AL., *Petitioners*

v.

CITY OF CLEVELAND, OHIO, ET AL., *Respondents*

PETITIONERS' REPLY BRIEF ON THE MERITS

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PETITIONERS' REPLY BRIEF ON THE MERITS

Petitioners Executive Jet Aviation, Inc. and Executive Jet Sales, Inc. [1] submit the following in reply to the arguments made and the authorities cited in the Briefs of respondents City of Cleveland, Ohio, and Phillip A. Schwenz,[2] and respondent Howard E. Dicken.[3]

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[1] Hereinafter petitioners will be referred to collectively as "EJA."

[2] Hereinafter referred to collectively as "the City."

[3] Hereinafter referred to as Dicken.

I.

RESPONDENTS' SHARP DISAGREEMENT OVER THE PROPER TEST TO BE APPLIED IN CASES INVOLVING AIRCRAFT CRASHES IN NAVIGABLE WATERS EMPHASIZES THE CLEAR ERROR OF THE COURT BELOW

In its brief the City argues that the court of appeals' holding in this case—that the tort occurred on land by virtue of this Court's rulings in *Smith & Son, Inc.* v. *Taylor,* 276 U.S. 179 (1928); *Minnie* v. *Port Huron Terminal Co.,* 295 U.S. 647 (1935); and *The Admiral People's,* 295 U.S. 649 (1935)—should be affirmed, and that the question of maritime nexus is not here presented. As stated by the City,... "[T]here is admittedly a conflict between the Third and Sixth Circuits as to the requirement of a maritime nexus.... This conflict may well be one which should be resolved by this Court. But *this case* does *not* present a record on which the conflict can be decided." Brief of the City at 25.

The Government, arguing on behalf of air traffic controller Dicken, argues on the other hand that this Court should use this aviation case as a vehicle to "resolve Mr. Benedict's 'celebrated doubt,'" and to fashion a "locality plus" rule for all maritime tort cases—including those involving injured swimmers, surfboard riders and the like.[4] The Government concedes that an irreconcilable conflict exists between the Sixth Circuit's ruling in this case and the Third Circuit's decision in *Weinstein* v. *Eastern Airlines, Inc.,* 316 F.2d 758 (3d Cir.), *cert. denied,* 375 U.S. 940

[4] It is interesting to note that at the district court and the court of appeals Dicken simply adopted the arguments made by the City in this case. In its Brief for Dicken filed in this Court the Solicitor General clearly parts company with both The City and the Sixth Circuit.

(1963); it urges this court to reject the *Weinstein* approach but is unwilling to support the Sixth Circuit's decision. The Government does not argue that cases involving aircraft crashes in navigable waters are "controlled" by the longshoremen's compensation cases relied upon by the Sixth Circuit. In fact, it recognizes the impracticalities of such a rule. "Since the cause of action arises where the alleged negligence took effect," the Government states, "... disputes over that question in aircraft cases will involve further litigation." Brief of Dicken at 29. Rather, the Government argues that admiralty jurisdiction should be found only in those cases involving aircraft crashes in navigable waters where there is "the presence of a 'maritime relation.' " *Id* at 18.

The respondents are also unable to agree as to what should constitute a "maritime nexus," or a "maritime relation." The City, arguing in the alternative, adopts the Sixth Circuit's view that a maritime nexus can exist only if "the *wrong* has a relationship to maritime affairs." Brief for the City at 33. The Government argues that a case involving an aircraft crash in navigable waters will have a maritime relation only if "the aircraft involved was at the time performing a function that previously would have been performed by a ship or other waterborne vessel." Brief of Dicken at 27. As an example, Dicken cites the case of *Hornsby* v. *The Fishmeal Co.*, 431 F.2d 865 (5th Cir. 1970), where two light aircraft collided while spotting fish and thereafter crashed into territorial navigable waters in the Gulf of Mexico.

Hornsby is a good illustration of why the respondents cannot get together in this case. First, *Hornsby* clearly holds contrary to the statements of both respondents

that the Fifth Circuit is a "locality plus" circuit insofar as aviation cases are concerned. The district court in *Hornsby* stated, "Tort claims arising out of the collision of land-based aircraft on navigable waters within the territorial waters of a state are cognizable in Admiralty." *Hornsby* v. *The Fishmeal Co.*, 285 F. Supp. 990, 993 (W.D.La. 1968). Furthermore, the City cannot make any plausible argument that a maritime nexus existed in *Hornsby* (because the *wrong* there alleged had a relationship to maritime affairs), and argue at the same time that no maritime nexus exists in this case. In *Hornsby* the "wrong" alleged was that the pilot in question violated 14 C.F.R. 91.67E, a Federal Aviation Regulation pertaining to the right-of-way of orbiting aircraft. It would be hard to imagine a more aviation-oriented "wrong;" yet the Fifth Circuit found the case to be cognizable in admiralty.

Two recent cases which have been reported since the filing of EJA's brief in this case further illustrate that, apart from the Sixth Circuit, the lower federal courts simply do not spend any time straining to see whether a case involving the crash of an aircraft in navigable waters is cognizable in admiralty either because the wrongs alleged have some relation to maritime affairs *or* because the aircraft in question was performing functions previously performed by vessels. *Lindsay* v. *McDonnell Douglas Aircraft Corporation*, 460 F.2d 631 (8th Cir. 1972); *Kelley* v. *Central National Bank of Richmond*, 345 F. Supp. 737 (E.D.Va. 1972). In *Lindsay* the Eighth Circuit held that claims arising out of the crash of a jet fighter aircraft in the Gulf of Mexico about 75 miles west of Key West, Florida, were cognizable in admiralty. At the time of the crash

the pilot and radar intercept officer were flying a night air intercept training mission. The "wrong" alleged was that the design of the aircraft was defective. In *Kelley* a district court held that claims arising out of the crash of a light aircraft 2400 yards offshore at Melbourne, Florida, were cognizable in admiralty. At the time of the crash the pilot, a doctor, was flying with a friend back to his home in Richmond, Virginia, from Pompano Beach, Florida, where they had been playing golf. The "wrong" alleged was that the doctor negligently took off into bad weather when he was not licensed to fly the aircraft on instruments..

The *Lindsay* case, *supra,* also points up another fallacious argument in the City's brief. The City argues that "admiralty law is not suited for the adjudication of issues arising in aviation tort cases." Brief of the City at 34. As an example the City states, "In many air crash cases claims are made that the manufacturer of the plane or one or more of its components was negligent in the design, manufacture or testing of the aircraft or component....Surely it needs no extended exposition to demonstrate that the complex, technical questions presented by such claims are wholly unrelated to any possible aspect of admiralty law." *Id* at 36. The Eighth Circuit did not find this reasoning persuasive in *Lindsay.* There the defendant aircraft manufacturer argued that the doctrine of a manufacturer's strict liability in tort, as stated in the RESTATEMENT (SECOND) OF TORTS § 402A, was inapplicable in admiralty. The Eighth Circuit said:

> The Death on the High Seas Act creates a cause of action for wrongful death....Jurisdiction of this action would rest in the federal dis-

> trict courts in admiralty. We feel this federal cause of action must follow general maritime law *which in turn incorporates the general law of torts where it is harmonious with admiralty law.* [Citing cases]
>
> While the doctrine of strict liability in tort... at its inception did not have the wide acceptance which would justify its incorporation into the general maritime law [citing cases], it has gained general acceptance in the intervening years and has been incorporated into admiralty law. [Citing cases]
>
> We think now that the doctrine of strict liability in tort is a part of the general maritime law and it is thus available to the plaintiff under the Death on the High Seas Act, which applies federal admiralty law. [Citing cases]. 460 F.2d at 636, (emphasis added).

In actual fact, for the past thirty years *every* court except the Sixth Circuit has applied the federal admiralty law to *every* case of an aircraft crashing in navigable waters whether the case involved a claim for death under the Death on the High Seas Act, a claim for death under a state statute or the general maritime law, a claim for personal injury or a claim for property damage to the aircraft. In *every* such case the courts have been perfectly able to determine the issues under the general maritime law, borrowing where necessary those doctrines which are harmonious with admiralty law.

The maritime relation in cases involving the crash of aircraft into navigable waters—which both respon-

dents spend so much time discussing—comes about because of the analogy "not between flying aircraft and sailing ships, but between a downed plane and a sinking ship."[5] As Judge Biggs stated in *Weinstein, supra,* "When an aircraft crashes into navigable waters, the dangers to persons and property are much the same as those arising out of the sinking of a ship or a collision between two vessels." 316 F.2d at 763. To this Judge Edwards, in his dissent in this case, added:

> I believe that there are many comparisons between the problems of aircraft over navigable waters and those of the ships which the aircraft are rapidly replacing.... Problems posed for aircraft landing on, crashing on, or sinking into navigable waters differ markedly from landings on land.... In such instances, wind and wave and water, the normal problems of the mariner, become the approach or survival problems of the pilot and his passengers.... *What I would hold is that tort cases arising out of aircraft crashes into navigable waters are cognizable in admiralty jurisdiction even if the negligent conduct is alleged to have happened wholly on land.* (Pet. for Cert., App. A, p. 24a, emphasis added).

EJA respectfully submits that the opinion of the Third Circuit in *Weinstein* and the dissenting opinion of Judge Edwards in this case state the proper resolution of this issue; that, except for the Sixth Circuit's opinion in this case, the lower federal courts have for

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[5] Note, *Admiralty—Jurisdiction Over Airplane Crashes On Navigable Waters,* 18 Wayne L.Rev. 1569, 1583 (1972).

thirty years resolved the issue in this manner; and that the court of appeals' ruling in this case is clearly erroneous and should be reversed by this Court.

Respectfully submitted,

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November 9, 1972

(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

EXECUTIVE JET AVIATION, INC. *v.* CITY OF CLEVELAND, OHIO, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 71–678. Argued November 15, 1972—
Decided December 18, 1972

Petitioners, invoking federal admiralty jurisdiction under 28 U. S. C. § 1331 (1), brought suit for damages resulting from the crash-landing and sinking in the navigable waters of Lake Erie of their jet aircraft shortly after takeoff from a Cleveland airport. The District Court dismissed the complaint for lack of admiralty jurisdiction on the grounds that the alleged tort had neither a maritime locality nor a maritime nexus. The Court of Appeals affirmed on the first ground. *Held:* Neither the fact that an aircraft goes down on navigable waters nor that the negligence "occurs" while the aircraft is flying over such waters is sufficient to confer federal admiralty jurisdiction over aviation tort claims, and in the absence of legislation to the contrary such jurisdiction exists with respect to those claims only when there is a significant relationship to traditional maritime activity. Therefore, federal admiralty jurisdiction does not extend to aviation tort claims arising from flights like the one involved here between points within the continental United States. Pp. 4–25.

448 F. 2d 151, affirmed.

STEWART, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 71–678

Executive Jet Aviation, Inc., et al., Petitioners,
v.
City of Cleveland, Ohio, et al.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

[December 18, 1972]

MR. JUSTICE STEWART delivered the opinion of the Court.

On July 28, 1968, a jet aircraft, owned and operated by the petitioners, struck a flock of seagulls as it was taking off from Burke Lakefront Airport in Cleveland, Ohio, adjacent to Lake Erie. As a result, the plane lost its power, crashed, and ultimately sank in the navigable waters of Lake Erie, a short distance from the airport. The question before us is whether the petitioners' suit for property damage to the aircraft, allegedly caused by the respondents' negligence, lies within federal admiralty jurisdiction.

When the crash occurred, the plane was manned by a pilot, a co-pilot, and a stewardess, and was departing Cleveland on a charter flight to Portland, Maine, where it was to pick up passengers and then continue to White Plains, New York. After being cleared for takeoff by the respondent Dicken, who was the federal air traffic controller at the airport, the plane took off, becoming airborne at about half the distance down the runway. The takeoff flushed the seagulls on the runway, and they rose into the airspace directly ahead of the ascending plane. Ingestion of the birds into the plane's jet

engines caused an almost total loss of power. Descending back toward the runway in a semi-stalled condition, the plane veered slightly to the left, struck a portion of the airport perimeter fence and the top of a nearby pickup truck, and then settled in Lake Erie just off the end of the runway and less than one-fifth of a statute mile off shore. There were no injuries to the crew, but the aircraft soon sank and became a total loss.

Invoking federal admiralty jurisdiction under 28 U. S. C. § 1333 (1),[1] the petitioners brought this suit for damages in the Northern District of Ohio against Dicken and the other respondents,[2] alleging that the crash had been caused by the respondents' negligent failure to keep the runway free of the birds or to give adequate warning of their presence.[3] The District Court, in an unreported opinion, held that the suit was not cognizable in admiralty and dismissed the complaint for lack of subject matter jurisdiction.

Relying primarily on the Sixth Circuit precedent of *Chapman* v. *City of Grosse Pointe Farms*, 385 F. 2d 962 (1967), the District Court held that admiralty jurisdiction over torts may properly be invoked only when two criteria are met: (1) the locality where the alleged tortious wrong occurred must have been on navigable

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[1] That section provides:

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

"(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

[2] Besides Dicken, the respondents are the City of Cleveland, as owner and operator of the airport, and Phillip A. Schwenz, the airport manager.

[3] The petitioners also filed an action against Dicken's employer, the United States, under the Federal Tort Claims Act, 28 U. S. C. §§ 1346 (b) and 2674, asserting the same claim. That action is pending in the District Court for the Northern District of Ohio.

waters; and (2) there must have been a relationship between the wrong and some maritime service, navigation, or commerce on navigable waters. The District Court found that the allegations of the petitioners' complaint satisfied neither of these criteria. With respect to the locality of the alleged wrong, the court stated that "the alleged negligence became operative upon the aircraft while it was over the land; and in this sense the 'impact' of the alleged negligence occurred when the gulls disabled the plane's engines [over the land] . . . . From this point on the plane was disabled and was caused to fall. Whether it came down upon land or upon water was largely fortuitous." Alternatively, the court concluded that the wrong bore no relationship to maritime service, navigation, or commerce:

> "Assuming . . . that air commerce bears some relationship to maritime commerce when the former is carried out over navigable waters, the relevant circumstances here were unconnected with the maritime facets of air commerce. The claimed 'wrong' in this case was the alleged failure to keep the runway free of birds and the failure to adequately warn the pilots of their presence upon the end of the runway. When the alleged negligence occurred, and when it became operative upon the aircraft, all the parties were engaged in functions common to all air commerce, whether over land or over sea.
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> . . . . . .
>
> "Thus, the conclusion here must be that the operative facts of the claim in this case are concerned with the land-connected aspects of air commerce, namely, the maintenance and operation of an airport located on the land and the dangers encountered by an aircraft when using its runways for take-off."

The Court of Appeals for the Sixth Circuit affirmed on the ground that "the alleged tort in this case occurred on land before the aircraft reached Lake Erie . . . ." 448 F. 2d 151, 154 (1971). Hence, that court found it "not necessary to consider the question of maritime relationship or nexus discussed by this Court in [*Chapman*]." *Ibid.* We granted certiorari to consider a seemingly important question affecting the jurisdiction of the federal courts. 405 U. S. 915 (1972).

I

Determination of the question whether a tort is "maritime" and thus within the admiralty jurisdiction of the federal courts has traditionally depended upon the locality of the wrong. If the wrong occurred on navigable waters, the action is within admiralty jurisdiction; if the wrong occurred on land, it is not. As early as 1813, Mr. Justice Story on Circuit stated this general principle:

> "In regard to torts, I have always understood, that the jurisdiction of the admiralty is exclusively dependent upon the locality of the act. The admiralty has not, and never (I believe) deliberately claimed to have any jurisdiction over torts, except such as are maritime torts, that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide."

Thomas v. *Lane*, 23 Fed. Cas. 957, 960 (C. C. D. Me). See also *DeLovio* v. *Boit*, 7 Fed. Cas. 418, 444 (C. C. D. Mass. 1815); *Pennsylvania, Wilmington and Baltimore R. Co.* v. *The Philadelphia and Havre de Grace Steam Towboat Co.*, 64 U. S. (23 How.) 209, 215 (1859). Later, this locality test was expanded to include not only tidewaters, but all navigable waters, including lakes and rivers. *The Genesee Chief* v. *Fitzhugh*, 53 U. S. (12 How.) 443 (1851).

In *The Plymouth*, 70 U. S. (3 Wall.) 20, 35, 36 (1866), the Court essayed a definition of when a tort is "located" on navigable waters:

> "[T]he wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least, the substance and consummation of the same must have taken place upon these waters to be within the admiralty jurisdiction. . . . The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed on the high seas or other navigable waters. . . . Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance."

The Court has often reiterated this rule of locality.[4] As recently as last Term, in *Victory Carriers, Inc.* v. *Law*, 404 U. S. 202, 205, we repeated that "[t]he historic view of this Court has been that the maritime tort jurisdiction of the federal courts is determined by the locality of the accident and that martime law governs only those torts occurring on the navigable waters of the United States."

This locality test, of course, was established and grew up in an era when it was difficult to conceive of a tortious occurrence on navigable waters other than in connection with a water vessel. Indeed, for the traditional types of maritime torts, the traditional test has worked quite satisfactorily. As a leading admiralty text has put the matter:

> "It should be stressed that the important cases in admiralty are *not* the borderline cases on juris-

[4] In *Victory Carriers, Inc.* v. *Law*, 404 U. S. 202, 205 n. 2 (1971), we cited over 40 cases to this effect.

> diction; these may exercise a perverse fascination in the occasion they afford for elaborate casuistry, but the main business of the [admiralty] court involves claims for cargo damage, collision, seamen's injuries and the like—all well and comfortably within the circle, and far from the penumbra." G. Gilmore & C. Black, The Law of Admiralty 24 n. 88 (1957).

But it is the perverse and casuistic borderline situations that have demonstrated some of the problems with the locality test of maritime tort jurisdiction. In *Smith & Son* v. *Taylor*, 276 U. S. 179 (1928), for instance, a longshoreman unloading a vessel was standing on the pier when he was struck by a cargo-laden sling from the ship and knocked into the water where he was later found dead. This Court held that there was no admiralty jurisdiction in that case, despite the fact that the longshoreman was knocked into the water, because the blow by the sling was what gave rise to the cause of action, and it took effect on the land. Hence, the Court concluded, "[t]he substance and consummation of the occurrence which gave rise to the cause of action took place on land." 276 U. S., at 182. In the converse factual setting, however, where a longshoreman working on the deck of a vessel was struck by a hoist and knocked onto the pier, the Court upheld admiralty jurisdiction because the cause of action arose on the vessel. *Minnie* v. *Port Huron Terminal Co.*, 295 U. S. 647 (1935). See also *The Admiral Peoples*, 295 U. S. 649 (1935).

Other serious difficulties with the locality test are illustrated by cases where the maritime locality of the tort is clear, but where the invocation of admiralty jurisdiction seems almost absurd. If a swimmer at a public beach is injured by another swimmer or by a submerged object on the bottom, or if a piece of machinery sustains

water damage from being dropped into a harbor by a land-based crane, a literal application of the locality test invokes not only the jurisdiction of the federal courts, but the full panoply of the substantive admiralty law as well. In cases such as these, some courts have adhered to a mechanical application of the strict locality rule and have sustained admiralty jurisdiction despite the lack of any connection between the wrong and traditional forms of maritime commerce and navigation.[5] Other courts, however, have held in such situations that a maritime locality is not sufficient to bring the tort within federal admiralty jurisdiction, but that there must also be a maritime nexus—some relationship between the tort and traditional maritime activities, involving navigation or commerce on navigable waters. The Court of Appeals for the Sixth Circuit, for instance, in the *Chapman* case, where a swimmer at a public beach was injured, held that

> "[a]bsent such a relationship, admiralty jurisdiction would depend entirely on the fact that a tort occurred on navigable waters; a fact which in and of itself, in light of the historical justification for federal admiralty jurisdiction, is quite immaterial to any meaningful invocation of the jurisdiction of admiralty courts." 385 F. 2d, at 966.[6]

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[5] *Davis* v. *City of Jacksonville Beach, Florida*, 251 F. Supp. 327 (MD Fla. 1965) (injury to a swimmer by a surfboard); *King* v. *Testerman*, 214 F. Supp. 335, 336 (ED Tenn. 1963) (injuries to a water skier). See also *Horton* v. *J & J Aircraft, Inc.*, 257 F. Supp. 120, 121 (SD Fla. 1966). Cf. *Weinstein* v. *Eastern Airlines, Inc.*, 316 F. 2d 758 (CA3 1963).

[6] In another injured swimmer case, *McGuire* v. *City of New York*, 192 F. Supp. 866, 871–872 (SDNY 1961), the court stated:

"The proper scope of jurisdiction should include all matters relating to the business of the sea and the business conducted on navigable waters.

"The libel in this case does not relate to any tort which grows out of navigation. It alleges an ordinary tort, no different in substance